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In The
Supreme Court of the United States

EBAY AND HALF.COM, INC.,

Petitioners,

v.

MERCEXCHANGE, L.L.C.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF OF AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION AND FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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AMICI CURIAE BRIEF OF THE AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION AND FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF NEITHER PARTY

This brief is submitted jointly by the American Intellectual Property Law Association ("AIPLA") and Federal Circuit Bar Association ("FCBA") as *amici curiae* in support of neither party to urge the Court to leave unchanged the current standards for issuing permanent injunctions in patent cases, thereby allowing district courts to continue to weigh and balance the equitable factors "in accordance with the principles of equity."

STATEMENT OF INTEREST[1]

AIPLA and FCBA (collectively "*Amici*") have no interest in any party to this litigation or stake in the outcome of this case, other than their interest in seeking a correct and consistent interpretation of the law affecting intellectual property.

AIPLA is a voluntary bar association of over 17,000 members who daily work with patents, trademarks, copyrights, trade secrets, and the legal issues that intellectual property presents. The FCBA is a national bar association with over 2,600 members, all of whom practice before, or have an interest in, the decisions of the Court of Appeals for the Federal Circuit in all areas of that court's jurisdiction.

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[1] In accordance with Supreme Court Rule 37.6, *Amici* state that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *Amici* or their counsel.

Amici's members include attorneys in private and corporate practice and in government service who secure, license, enforce, and defend against enforcement of intellectual property rights. They regularly counsel and advise their clients regarding seeking or opposing permanent injunctions in patent cases. Accordingly, this Court's decision to consider the standards for issuing permanent injunctions in patent cases may materially impact *Amici's* members.

Through their diverse representation, *Amici* bring a broad perspective and extensive experience to the important issues raised in this case. *Amici* are able to offer the Court a unique and balanced perspective because their members represent parties on both sides of the issues raised in this case: (1) patent owners who may have to judicially enforce their patents and seek a permanent injunction; and (2) competitors or accused infringers who may be subject to a request for a permanent injunction should liability become established. Both sides have to consider the possibility of entry of a permanent injunction in deciding whether to settle threatened or actual litigation.

Amici have sought consent to file this brief from the counsel of record for all parties, pursuant to Supreme Court Rule 37.3(a). Counsel for all parties consented. Copies of the letters of general consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

This Court has elected to consider: 1) whether the Federal Circuit correctly articulated the "general rule" that a permanent injunction will normally issue in patent cases after a finding of liability absent exceptional circumstances; and 2) its prior precedents including *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405 (1908), regarding when it is appropriate to grant an injunction against a patent infringer.

The Federal Circuit's "general rule" that a permanent injunction will normally issue in a patent case once liability has been established is fully consistent with 35 U.S.C. § 283 and is well-grounded in the traditional factors governing the issuance of injunctions. The Federal Circuit's statement of the "general rule" appropriately recognizes that three of the traditional injunction factors (irreparable harm, inadequate remedy at law and the public interest), will normally favor the patentee as a result of the inherently limited nature of the patent's exclusive right and the strong public policy favoring enforcement of valid patents.

Although the Federal Circuit did not expressly discuss each of the traditional injunction factors in its opinion in this case, the Federal Circuit historically has applied those factors in a way that properly balances the rights of the patentee and the public's interest in a robust patent system against the needs of the defendant and the public. Despite repeated claims that the Federal Circuit has divested district courts of the discretion to enter an injunction, Petitioners and their *amici* have not identified, nor can they identify, a single Federal Circuit holding requiring district courts to adopt an "automatic" or "*per se*" injunction rule in patent cases. In the present case, the Federal Circuit merely explained that

the facts on which the district court relied to deny an injunction were insufficient to support the district court's decision. Accordingly, no change to the traditional injunction factors or to the Federal Circuit's "general rule" is warranted.

The Federal Circuit's "general rule" is no different than that employed in trademark, copyright, and real property cases. Moreover, the Federal Circuit did not create the "general rule." That rule has been recognized in patent cases for well over 150 years.

This Court's prior decisions in *Continental Paper Bag* and its progeny correctly hold that permanent injunctions are available to patentees who do not use the patent by manufacturing a product or employing a process covered by the patent. The Court should reject any suggestion that the mere failure or inability of a patentee to use the patent in this way, standing alone, should preclude the availability of injunctive relief. Rather than attempt to fashion a bright-line rule with respect to non-using patentees, courts should consider whether the patentee makes the patented product or employs the patented process as one factor that may be relevant to the traditional equitable factors governing entry of an injunction. A dramatic change in this Court's precedent with respect to the availability of injunctive relief in patent cases would upset the well-established balance between the rights of the patentee and the public that has been critical to fostering the incentives to innovate that the patent system has successfully promoted since its inception.

ARGUMENT

I. The Federal Circuit Consistently Has Recognized District Courts' Discretion In Deciding Whether To Grant Or Deny Permanent Injunctions

The United States Constitution authorizes Congress "To promote the Progress of ... useful Arts, by securing for limited Times to ... Inventors the exclusive Right to their ... Discoveries." U.S. CONST. art. I, § 8, cl. 8. Thus, the Founding Fathers authorized Congress to grant inventors an "exclusive right" to their inventions, not merely the right to collect damages. Congress responded by authorizing district courts to "grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable." 35 U.S.C. § 283.

Petitioners' primary argument is that the Federal Circuit systematically has discarded Section 283 in its injunction analysis, adopting instead a *per se* rule that fails to acknowledge the district court's discretion in implementing that statute. Petition at 2. The Federal Circuit's statement that patentees are normally entitled to a permanent injunction once infringement and validity have been established is fully consistent with Section 283 of the Patent Act.

Contrary to Petitioners' suggestion, the Federal Circuit often has recognized that Section 283 entrusts district courts with the equitable discretion to grant or deny permanent injunctions in patent cases:

> Section 283 of Title 35 authorizes district courts, upon a finding of infringement, to impose a

> permanent injunction 'in accordance with the principles of equity.' Thus, while we have stated the general rule that an injunction should follow an infringement verdict, we also recognize that district courts, as befits a question of equity, enjoy considerable discretion in determining whether the facts of a situation require it to issue an injunction.

Odetics, Inc. v. Storage Tech. Corp., 185 F.3d 1259, 1272 (Fed. Cir. 1999) (internal citations omitted).[2]

When evaluating whether a district court properly exercised its discretion in granting or denying an injunction, this Court has traditionally looked to four equitable factors: 1) whether the plaintiff would face irreparable injury if the injunction did not issue, 2) whether the plaintiff has an adequate remedy at law, 3) whether granting the injunction is in the public interest, and 4) whether the balance of hardships tips in the plaintiff's favor. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Collectively, these

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[2] *See also Carborundum Co. v. Molten Metal Equip. Innovations*, 72 F.3d 872, 881 (Fed. Cir. 1995) ("[C]ourts have broad discretion in determining appropriate relief for patent infringement."); *Kearns v. Chrysler Corp.*, 32 F.3d 1541, 1551 (Fed. Cir. 1994) ("[E]ntitlement to an injunction implementing the right to exclude, as compared with only assessing damages against an infringer, is not absolute even during the life of a patent, but is discretionary."); *Ortho Pharm. Corp. v. Smith*, 959 F.2d 936, 945 (Fed. Cir. 1992) ("[Section 283] grants the district courts broad discretion in determining whether the facts of a case warrant an injunction and in determining the scope of the injunctive relief."); *Roche Prods. v. Bolar Pharm. Co.*, 733 F.2d 858, 865 (Fed. Cir. 1984) ("Whether an injunction should issue in this case, and of what form it should take, certainly depends on the equities of the case."); *W.L. Gore & Assoc., Inc. v. Garlock*, Inc., 842 F.2d 1275, 1281 (Fed. Cir. 1988) (recognizing a district court's discretion in entering a permanent injunction).

factors provide a way to balance the rights of the patentee against the potential harm to the defendant, while considering the public's interest in a robust patent system. The Federal Circuit's articulation of the "general rule" that an injunction normally follows a finding of patent infringement does not require district courts to depart from this traditional four-factor equitable analysis.

II. Upon a Determination of Liability, A Patentee Is Normally Entitled To A Permanent Injunction Under The Traditional Equitable Factors

The Federal Circuit's "general rule" that normally requires a permanent injunction upon a determination of liability simply reflects that continued infringement of a valid patent causes the patentee irreparable harm that is not compensable by money damages, and violates the public policy favoring enforcement of valid patents. Whether stated as a presumption or a general rule, the Federal Circuit's recognition does not abandon the traditional equitable injunction analysis, but merely recognizes that the analysis begins weighted in favor of the patentee and against an adjudicated infringer.[3] Indeed, Petitioner does not appear to dispute that an injunction is usually the proper remedy for patent infringement. *See* Petition at 26. In light of the effect of the nature of the patent grant on the traditional equitable

[3] Simply because the Federal Circuit's opinion in this case did not proceed in formal four-factor fashion does not mean that the court has abandoned the traditional equitable analysis. Where, as here, the parties limit their arguments to fewer than all of the factors, the court need address only those arguments presented.

factors, courts historically have rarely exercised their discretion to deny patentees the primary benefit of their temporary right to exclude.[4]

A. The Federal Circuit's "general rule" correctly recognizes that the harm caused by continued infringement of a valid patent is inherently irreparable due to the limited nature of the patent right

The Federal Circuit's "general rule" recognizes that infringement necessarily results in irreparable harm because of the temporally limited nature of the patent grant. Infringement deprives the patentee of the basic exclusive right conferred by the patent for a period that never can be restored.

A patent grant confers upon its owner "the right to *exclude* others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States ..." for a limited term. 35 U.S.C. § 154(a)(1)-(2) (emphasis added).

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[4] Petitioners and their *amici* supporters claim they have been unable to find a case since the Federal Circuit's decision in *Roche Products v. Bolar Pharmaceutical. Co.*, 733 F.2d 858, 865 (Fed. Cir. 1984), in which that court has affirmed the denial of a permanent injunction (although such examples in the context of preliminary injunctions abound). *See, e.g.*, Petition at 17-18. Petitioners and *amici* fail to acknowledge that historically the occurrence of facts sufficient to warrant the denial of a permanent injunction is rare in *any* court, including this one. In the nearly two hundred years of patent law that preceded the creation of the Federal Circuit, only a handful of courts have denied injunctions following a finding of infringement of a valid patent. Thus, a historical analysis of patent cases refutes any suggestion that the Federal Circuit's decision in the present case is part of some alarming recent trend.

Thus, "the franchise secured by a patent consists only in the right to exclude others from making, using, or vending the thing patented without the permission of the patentee." *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 463 (1922); *see Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 215 (1980) ("[T]he essence of a patent grant is the right to exclude others from profiting by the patented invention."); *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983) ("right to exclude recognized in a patent is but the essence of the concept of property").

Because "[t]he very nature of the patent right is the right to exclude others," the Federal Circuit has explained, "[o]nce the patentee's patents have been held to be valid and infringed, he should be entitled to the full enjoyment and protection of his patent rights." *Smith Int'l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983). Continued infringement of a patent determined to be valid and infringed completely deprives the patentee of the right under the patent to exclude others. "It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation." *Continental Paper Bag*, 210 U.S. at 430.

Moreover, a patent has a limited term, in most cases 20 years from the date the application is filed. 35 U.S.C. § 154(a)(2). That period is not tolled during an infringement. Continued infringement would deprive the patentee of the exclusive right conferred by the patent for a period of time that cannot be recovered. Thus, by its very nature, the patentee's loss of its finite exclusivity period is irreparable. *See H.H. Robertson Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987), *overruled in part on other grounds by Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (*en banc*) (recognizing that a

patentee is irreparably harmed by an infringement due to the limited duration of the patent grant).

Indeed, irreparable harm is presumed in preliminary injunction proceedings upon a clear showing of validity and infringement precisely because continued invasion of the exclusive right conferred by a valid patent irreparably harms the patentee. *Id.; Smith*, 718 F.2d at 1581; *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 975 (Fed. Cir. 1996). In the context of a permanent injunction, the final determination of validity and infringement *conclusively* establishes that continuing infringement—the continued deprivation of the patentee's temporary right to exclude—will irreparably harm the patentee. Thus, upon a final judgment of infringement, the equitable injunction analysis begins with the first equitable factor, the patentee's irreparable harm, having been established.

B. The Federal Circuit's "general rule" correctly recognizes that patentees lack an adequate remedy at law for continued infringement of a valid patent

The Federal Circuit's decision correctly rejected the district court's finding that the patentee's willingness to license its patents to the defendants and to others established that the patentee has an adequate remedy at law. *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005). This is consistent with a long line of Federal Circuit cases recognizing that the nature of the patent grant weighs against holding that monetary damages are an adequate remedy for infringement. *See Hybritech, Inc. v. Abbott Labs.*, 849 F.2d 1446, 1456-57 (Fed. Cir. 1988); *H.H. Robertson*, 820 F.2d at 390; *Atlas Powder Co. v. Ireco Chems.*, 773 F.2d 1230, 1233 (Fed. Cir. 1985).

The adequacy of the legal remedy is subject to dispute in preliminary injunction proceedings, where validity and infringement have yet to be established. *See High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1557 (Fed. Cir. 1995). A final determination of validity and infringement establishes the inadequacy of the legal remedy, just as it establishes irreparable harm. Continued infringement of a valid exclusive right cannot be compensated entirely by monetary damages. "Although [monetary] damages might be 'adequate' in the sense that they could replicate what might be a reasonable royalty for such continued infringement, damages, however measured, are nonetheless inadequate because limiting [the patentee] to damages does not allow it to exercise the monopoly power granted to it by the statute; an injunction is the only remedy that can achieve that goal." *Odetics, Inc. v. Storage Tech. Corp.*, 14 F. Supp. 2d 785, 795 (E.D. Va. 1998), *aff'd*, 185 F.3d 1259 (Fed. Cir. 1999).

This same reasoning is applied in copyright and trademark cases as well. *See Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 967-68 (8th Cir. 2005) (in copyright cases, liability establishes inadequate remedy at law and irreparable harm because denial of permanent injunctive relief would amount to "forced license"); *E. & J. Gallo Winery v. Spider Webs Ltd.*, 286 F.3d 270, 280 (5th Cir. 2002) (remedy at law would not protect trademark owner's reputation if infringer could continue to use mark); *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1180 (9th Cir. 1988) ("[T]here is no adequate remedy at law for the injury caused by a defendant's continuing [trademark] infringement."). Continued infringement of the exclusive right, once that right has been determined valid, is not entirely compensable in money damages, even where, as here, the patentee has offered to license the patent to others.

Thus, upon a final judgment of infringement of a valid patent, the analysis begins with the second equitable factor, the inadequacy of the legal remedy, having been established.

C. The Federal Circuit's "general rule" properly recognizes the public's strong interest in the enforcement of valid patents

The public policy analysis begins with a presumption favoring the patentee on the third equitable factor. "[P]ublic policy favors protection of the rights secured by . . . valid patents." *Smith*, 718 F.2d at 1581. As this Court has explained, "the patent system represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time." *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998) (*quoting Bonito Boats Inc. v. Thunder Craft Boats Inc.*, 489 U.S. 141, 150-51 (1989)). The Federal Circuit grounded its recognition of that public policy in the Constitutional bargain between the inventor and the public, which the patent laws provide:

> Without the right to obtain an injunction, the right to exclude granted to the patentee would have only a fraction of the value it was intended to have, and would no longer be as great an incentive to engage in the toils of scientific and technological research.

Smith, 718 F.2d at 1578. As the district court recognized below, "[t]he public-interest factor often favors the patentee, given the public's interest in maintaining the integrity of the patent system." *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695, 713 (E.D. Va. 2003), *rev'd* 401 F.3d

1323 (Fed. Cir. 2005) (quoting *Odetics,* 14 F. Supp. 2d at 795).

Thus, the public interest factor is initially weighted in favor of securing to the patentee the benefits of his bargain with the public and in favor of enforcing his right to exclude. *Cf. Hybritech,* 849 F.2d at 1458 (considering the public interest in favor of enforcing valid patents in the preliminary injunction context). That the public interest favors enforcement of valid patents, however, does not mean that patent infringement injunctions are "automatic." *Cf. id.* (affirming injunction against some, but not all, of accused products because, "with respect to these products, the district court concluded that the public interest was in favor of granting the preliminary injunction."). As the Federal Circuit often has explained, including in this very case, the substantial public interest in maintaining future incentives for inventors to develop and disclose their technology can be outweighed when the "patentee's failure to practice the patented invention frustrates an important public need for the invention,' such as the need to use an invention to protect public health." *MercExchange*, 401 F.3d at 1338 (*quoting Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1547 (Fed. Cir. 1995) (*en banc*)); *see also Vitamin Technologists, Inc. v. Wisc. Alumni Res. Found.*, 146 F.2d 941, 956 (9th Cir. 1945); *City of Milwaukee v. Activated Sludge, Inc.*, 69 F.2d 577, 593 (7th Cir. 1934).

In the present case, the only public interest the district court identified as supporting the denial of an injunction was "a growing concern over the issuance of business-method patents, which forced the PTO to implement a second level review policy and cause legislation to be introduced in Congress to eliminate the presumption of validity for such patents." *MercExchange*, 401 F.3d at 1339. As the Federal

Circuit correctly held, a nebulous general concern regarding the propriety of certain kinds of patents is not the type of important public need that should trump the public's interest in the enforcement of valid patents. Indeed, the district court appears to have recognized that any "concern" regarding the issuance of business method patents is an issue for Congress.[5] In rejecting the sole basis for the district court's public interest finding, the Federal Circuit both considered the public interest factor and confined its analysis to the only relevant point presented, the public interest in enforcing valid patents.

D. The Federal Circuit's "general rule" may, in limited circumstances, be overcome by hardship to the infringer greatly disproportionate to that of the patentee

Even though continued infringement of a valid patent irreparably harms the patentee in a way that is not entirely compensable by money damages, and is contrary to the public interest in enforcing valid patents, the grant of an injunction is not "automatic." The final component of the equitable analysis examines the balance of the hardships.

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[5] The district court's reliance on a bill "to eliminate the presumption of validity for [business method] patents," 275 F. Supp. 2d at 713-14, was misplaced. House bill, H.R. 1332, 107th Cong., 1st Sess. § 4 (Apr. 3, 2001), which would have eliminated the presumption of validity for only a limited category of business-method patents, was never enacted, and the concern about business method patents in general was overblown at the time. *See generally* Statement of Michael K. Kirk, Executive Director, American Intellectual Property Law Association Before the Subcommittee on Courts, The Internet and Intellectual Property, Committee on the Judiciary, United States House of Representatives, Oversight Hearing on Business Method Patents, 2001 WL 333935 (F.D.C.H.) (April 4, 2001).

This balance weighs the hardship the patentee would suffer without the injunction against the harm the injunction would impose on the infringer. *Cf. Weinberger*, 456 U.S. at 312 ("Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims.") (*quoting Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). As this Court has explained in the nuisance context, "Where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable." *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1933).

Real property cases have long considered the balance of the hardships to the property owner and the party accused of trespass, encroachment or nuisance. *See generally id.* at 338 n.1 (collecting cases denying injunctions "because the injury was small and an injunction would have imposed too great a burden on the defendant"); Barton H. Thompson, Jr., *Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 STAN. L. REV. 1563, 1564 n.8, 1577-80 (1975); W. Page Keeton & Clarence Morris, *Notes on "Balancing The Equities,"* 18 TEX. L. REV. 412 (1940); Henry L. McClintock, *Discretion to Deny Injunction Against Trespass and Nuisance*, 12 MINN. L. REV. 565 (1928). Under the "relative hardship doctrine" applied in real property cases, courts weigh the relative hardships (the burdens to the enjoined party and third parties, typically the public, from the injunction and the burden on the property owner if the

injunction is not granted) and will not issue the injunction if its burdens greatly exceed the benefits.[6]

The balancing of hardships in property cases is instructive for patent law. "Courts have continually recognized patent rights as property ...." *Fl. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 637 (1999); *see also* Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108 (1990).

This same balancing approach should be available in patent cases in which relevant evidence is introduced.[7] *See*

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[6] *See* Thompson, 27 STAN L. REV. at 1577 n.9; *see also* Restatement (First) of Property Section 563 (1944); *Hentz v. City of Spearfish*, 648 N.W.2d 338 (S.D. 2002) (injunction denied where home addition built under good faith belief of compliance with building permit, which turned out to be erroneously issued, and injunction would require tearing down structure and demolishing foundation); *Stuttgart Elec. Co. v. Riceland Seed Co.*, 802 S.W. 2d 484 (Ark. App. 1991) (injunction denied where structure's encroachment was unintentional and slight and cost of removal greatly outweighed harm to property owner); *Golden Press v. Rylands*, 235 P.2d 592, 596 (Colo. 1951) (same); *Mayer's Appeal*, 73 Pa. 164 (1873) (same).

[7] In real property cases, some courts refuse to consider the defendant's harm unless his actions were innocent. Thompson, 27 STAN. L. REV. at 1577 n.9; *see also Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 87 P.3d 81 (Ariz. App. 2004) (injunction required removal of cell phone tower built with knowledge of restrictive covenant violation and neighbors' objection); *Renaissance Dev. Corp. v. Universal Props. Gp., Inc.*, 821 A.2d 233 (R.I. 2003) (injunction required removal of encroaching retaining wall built with knowledge of plaintiff's objections). Application of this "innocence" requirement for the balance of the hardships has not yet been explored in a patent case. Here, eBay was found to be a willful infringer and apparently did not appeal from the willfulness finding. *MercExchange*, 401 F.3d at 1326. But willfulness in patent cases does not necessarily equate to lack of "innocence" in real

Carborundum, 72 F.3d at 882 n.9 (The balance of the hardships to the patentee and the infringer "were clearly factors the court must have considered when determining whether to grant an injunction in accordance with the principles of equity."); *see also* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L. J. 1, 73-74 (2004) (urging application of equitable limitations on real property enforcement to intellectual property). And indeed it has been applied in patent cases. *See Foster v. Am. Mach. & Foundry Co.*, 492 F.2d 1317, 1324 (2nd Cir. 1974) (affirming denial of injunction where "[I]n the assessment of [the] relative equities, the court could properly conclude that to impose irreparable hardship on the infringer by injunction, without any concomitant benefit to the patentee, would be inequitable"); *Ramp Res. & Dev., Inc. v. Structural Panels, Inc.*, 977 F. Supp. 1169, 1178 (S.D. Fla. 1997), *aff'd in part, rev'd in part, vacated in part*, 230 F.3d 1381 (Fed. Cir. 2000) (citing *Foster* and granting injunction against one infringer while denying injunction against another infringer that had taken an exclusive license from the patentee).

As a practical matter, the balance of hardships is rarely at issue in patent cases. Even when it is, that balance rarely favors the infringer. Generally, infringers either fail to present any evidence of hardship, present evidence that is speculative, or allege a hardship that does not greatly outweigh the hardship to the patentee. *See, e.g., Johns*

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property cases. In patent cases, infringement can be found willful even where it is initially undertaken in complete innocence. *See, e.g., Am. Med. Sys., Inc. v. Med. Eng'g Corp.*, 6 F.3d 1523, 1530-33 (Fed. Cir. 1993).

Hopkins Univ. v. CellPro, Civil Action No. 94-105-RRM, 1997 U.S. Dist. LEXIS 24162, *9 (D. Del. July 24, 1997), *aff'd in part, vacated in part*, 152 F.3d 1342 (Fed. Cir. 1998) (entering injunction after weighing relative hardships because infringer's evidence of hardship was "highly speculative"). Some plaintiffs even present evidence contradicted by their own public statements. *See Odetics*, 14 F. Supp. 2d at 797 & n.30 (rejecting assertion of hardship in view of infringer's press release issued the day the jury returned its verdict stating that it had designed a noninfringing alternative).

Indeed, the trial court below noted that Petitioners claimed "they can design around the patents with relative ease." *MercExchange,* 275 F. Supp.2d at 714. The trial court relied on MercExchange's dispute of that claim as evidence that the parties would dispute the scope and applicability of any injunction, and that because the parties would likely have ongoing disputes regarding infringement, the balance of the hardships tipped "slightly" in defendants' favor. *Id.* While the Petitioner argues that there would be a hardship in the judicial administration of any injunction, the Federal Circuit correctly recognized that the burden of judicial administration—at least standing alone—is insufficient because it does not pose hardship to the defendant. *MercExchange*, 401 F.3d at 1339. That the Federal Circuit did not address any additional alleged hardships to the defendant appears to have resulted from the parties' failure to offer evidence, not a categorical refusal to consider hardship to the infringer.[8]

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[8] Other *amici* have cited to the Federal Circuit's dicta in *Windsurfing International, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986) ("One who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against

Instead of hardships they would suffer from the injunction, Petitioners focus on an analogy to courts in real property cases that have refused to enjoin single instances of trespass. Petition at 23. Like most patent infringement cases, however, this case does not involve a single instance of infringement that is unlikely to be repeated. Absent an injunction, Petitioners would continue to infringe the patent that the trial court and Federal Circuit have held not invalid. In any event, the single instance of trespass analogy is inapt; the Federal Circuit said that an injunction should be refused where all infringement has ceased and is highly unlikely to be repeated. *See W.L. Gore*, 842 F.2d at 1281.

III. The Federal Circuit Did Not Create The "General Rule"

A. The Federal Circuit's "general rule" has been a part of the patent system for more than a century and a half

The Federal Circuit's "general rule" that an injunction will normally issue upon a finding of infringement of a valid patent is not new. Courts and commentators alike have embraced this rule for more than a century and a half. *See* Walter H. Free, *Infringement Suits, in* Robert Calvert, THE

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continuing infringement destroys the business so elected."), to argue that the Federal Circuit refuses to consider the hardship an injunction would pose to the defendant. The Federal Circuit has since emphasized that its holding in *Windsurfing* was quite narrow: "that the district court abused its discretion in refusing to enjoin one infringer, despite having granted injunctions as to all other infringers, giving as its sole reason the small size of the former's business." *Std. Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 515 (Fed. Cir. 1990).

ENCYCLOPEDIA OF PATENT PRACTICE & INVENTION MANAGEMENT 451, 458 (1964) ("Generally, a plaintiff whose patent has been adjudicated as valid and infringed is entitled to a permanent injunction against further infringement."); William E. Simonds, A SUMMARY OF THE LAW OF PATENTS FOR USEFUL INVENTIONS 250 (1883) ("When in the course of an equity suit, the court, on final hearing upon pleadings and proofs, finds that the patent is valid, and that it has been infringed, the court grants, as a matter of course, a perpetual injunction against the infringer."); John P. Norman, A TREATISE ON THE LAW AND PRACTICE RELATING TO LETTERS PATENT FOR INVENTION 145 (1853) ("It is almost a matter of course to grant or revive an injunction when the plaintiff has established his title at law."); George T. Curtis, A TREATISE ON THE LAW OF PATENTS FOR USEFUL INVENTIONS 388 (1849) ("After a trial and judgment at law, in favor of the plaintiff, the injunction will be revived or granted as a matter of course."); Willard Phillips, THE LAW OF PATENTS FOR INVENTIONS 468 (1837) ("If on a trial at law the plaintiff establishes his right, the injunction on the defendant is, on his motion, made perpetual."). For more than 150 years, when choosing to disclose their inventions to the public in exchange for a patent, inventors have relied upon the general expectation that, with limited equitable exceptions, they will be able to obtain injunctions against infringement of their patents.

B. The Federal Circuit's "general rule" is consistent with the analysis applied in other areas of property law

Not only is the Federal Circuit's "general rule" within the mainstream of the law of injunctions, it comports with the principles governing injunctions in other areas of intellectual

property law. In trademark law, infringements are considered by their very nature irreparable. *See Lermer Germany GmbH v. Lermer Corp.*, 94 F.3d 1575, 1577 (Fed. Cir. 1996) ("A permanent injunction issues to a party after winning on the merits and is ordinarily granted upon a finding of trademark infringement."); 5 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:2 at 30-8 (4th ed. 2005) (collecting cases). The same holds true for copyright law. See 4 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 14.06[B] (2005). Accordingly, the "general rule" is widely accepted and ought not to be cast aside.

IV. This Court Should Not Overrule Its Limited Holding In *Continental Paper Bag*

A. This Court's analysis in *Continental Paper Bag* remains sound public policy

In addition to considering the Federal Circuit's "general rule" regarding injunctions in patent cases, this Court also asked the parties to brief whether the Court should reconsider its prior precedent, including its decision in *Continental Paper Bag*. That decision addressed whether an injunction would be available to a patentee who did not use his patent by making a product or employing a process covered by the patent. 210 U.S. at 422. This Court initially noted that the patentee did not manufacture the patented product because it was using a competing technology, and it would have been costly to change to the patented design, a justification the Court refused to find *per se* unreasonable. *Id.* at 429.

This Court observed that Congress was well aware that some patentees do not use their patents by making patented products or using patented processes, and that in some foreign countries nonuse could negatively affect a patentee's rights. *Id.* "This policy, we must assume, Congress has not been ignorant of nor of its effects. It has, nevertheless, selected another policy; it has continued that policy through many years. We may assume that experience has demonstrated its wisdom and beneficial effect upon the arts and sciences." *Id.* at 429-30.

Although the Court recognized that a patentee's right to exclude would be rendered useless if it could not be enforced, it declined to decide when a court should equitably refuse an injunction. "Whether, however, a case cannot arise where, regarding the situation of the parties in view of the public interest, a court of equity might be justified in withholding relief by injunction we do not decide." *Id.* at 430.

This Court's reasoning in *Continental Paper Bag* is at least as applicable today as it was in 1908. On numerous occasions since this Court's decision in *Continental Paper Bag*, Congress has considered adopting provisions that would cause patentees who do not use their patents to lose the ability to enjoin infringers. *See Hartford-Empire Co v. United States*, 323 U.S. 386, 433 (1945) ("Congress has repeatedly been asked, and has refused, to change the statutory policy by imposing a forfeiture or by a provision for compulsory licensing if the patent is not used within a specified time."). Notwithstanding repeated efforts to convince Congress to restrict the ability of non-using patentees to obtain injunctions, Congress has not done so. *See, e.g., Oversight Hearing on the Committee Print Regarding Patent Quality Improvement*, House Jud. Comm.

(June 9, 2005) (directed in part to an injunction provision in House Committee Print, http://judiciary.house.gov/media/pdfs/comprint042005.pdf § 7 (April 14, 2005), that was dropped before introduction of H.R. 2795, the "Patent Act of 2005," 109th Cong. (2005)).

A rule diminishing the ability of a non-manufacturing entity to obtain an injunction would also undermine the policy established by Congress in the Bayh-Dole Act (P.L. 96-517, the Patent and Trademark Law Amendments Act) in 1980 and in subsequent amendments to that Act in 1984 (P.L. 98-620). Before that legislation, the Federal Government's reluctance to allow universities to obtain title to government-sponsored inventions meant that universities could not use the exclusivity of patents to foster the commercialization of such inventions. Thus, although taxpayers were supporting federal research, they were not benefiting from useful products or the economic development that would have occurred with the manufacture and sale of resulting products. Congress' enactment of the Bayh-Dole Act reflected its judgment that the public would benefit from permitting universities to own inventions made under federal funding and to become directly involved in the commercialization process. Congress "understood that stimulation of the U.S. economy would occur through the licensing of new inventions from universities to businesses that would, in turn, manufacture the resulting products in the U.S." *See, e.g.*, COUNCIL ON GOVERNMENT RELATIONS, THE BAYH-DOLE ACT: A GUIDE TO THE LAW AND IMPLEMENTING REGULATIONS 2 (1999). Congress understood that universities do not engage in manufacturing and that the only way universities could achieve the congressional goal of transferring federally funded research to the marketplace was through licensing the resulting patents. Like universities, independent inventors, start-up companies, research

institutes and others may have sound reasons for not using their patents by manufacturing a product or employing a process covered by the patent. To limit the ability of these non-manufacturing entities to obtain injunctive relief would undermine the very purpose for which Congress enacted the Bayh-Dole Act.

This Court should respect Congress's repeated rejection of proposals to distinguish patentees who manufacture their patented products or use their patented methods from those who do not. Such a distinction would unfairly deprive most independent inventors, start-up companies, research institutions and universities of their principal remedy for patent infringement.

B. Courts should consider whether a patentee uses the patented technology in connection with other equitable factors

The repeated failure of Congress to establish a statutory distinction between patentees who use their patent rights and patentees who do not use their patent rights does not mean that a patentee's failure to use the patented technology is completely irrelevant to whether a permanent injunction should issue. To the contrary, courts can, and do, consider a patentee's failure to use the patent and reasons for that non-use in connection with the traditional equitable factors. For example, although a patentee necessarily suffers at least some irreparable harm as a result of continued infringement of its valid patent, the fact that it has made no use of the patented invention and reasons for such non-use may be relevant to the balance of hardships, particularly the hardship to the patentee that would be imposed by the denial of an injunction. *See, e.g., Foster*, 492 F.2d at 1324.

Similarly, the Federal Circuit has held that whether a patentee uses the patented invention could be relevant to a court's evaluation of the public's interest in an injunction. As the Federal Circuit explained in its decision below, "we have stated that a court may decline to enter an injunction when 'a patentee's failure to practice the patented invention frustrates an important public need for the invention,' such as the need to use an invention to protect public health."[9] *MercExchange*, 401 F.3d at 1338 (*quoting Rite-Hite*, 56 F.3d at 1547). Thus, while not precluding an injunction standing by itself, a patentee's failure to practice the invention is relevant to the court's exercise of discretion to grant an injunction "in accordance with the principles of equity."

CONCLUSION

The Federal Circuit's "general rule" that an injunction will normally issue once liability for patent infringement has been established recognizes the inherently irreparable nature of the harm resulting from continued infringement of a valid patent, the inadequate remedy at law for that continued

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[9] Based on the language quoted above, Petitioners and other *amici* have suggested that the Federal Circuit implicitly held that injunctions may be refused *only* in the case of a national health emergency. *See, e.g.*, Petition at 12. That is incorrect. The Federal Circuit has referred to the need to use an invention to protect public health merely because such situations present the most compelling public-interest basis for denying an injunction. The Federal Circuit has never limited the public interest factor to health emergencies. As the Federal Circuit's *en banc* decision in *Rite-Hite* suggests, the public interest is implicated by "an important public need for the invention" uncoupled to any health emergency. *Rite-Hite*, 56 F.3d at 1547. Although the public interest historically has arisen in the context of public health issues, nothing in the Federal Circuit's jurisprudence suggests the narrow limitation that the Petitioners argue.

infringement, and the strong public interest in the enforcement of valid patents.

Moreover, this Court's limited holding in *Continental Paper Bag* that an injunction may be available regardless of whether the patentee practices the patented invention remains good law and reflects sound public policy. That holding does not preclude consideration of whether the patentee practices the patented invention, which remains a factor in deciding whether to grant or deny an injunction "in accordance with the principles of equity."

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